

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIE L. MASON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims is reported at 461 F. 2d 1364. It is reproduced as Appendix A to the petition for a writ of certiorari filed by the State of Oklahoma in this case (No. 72-606, Pet. App. A-1 to A-29).

JURISDICTION

The judgment of the Court of Claims was entered on June 16, 1972 (No. 72-606, Pet. App. A-1). On September 13, 1972, Chief Justice Burger extended

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the time for the United States to file a petition for a writ of certiorari to and including October 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the United States is liable to the estate of a restricted Osage Indian for inheritance taxes it paid to the State of Oklahoma in reliance on this Court's decision in *West v. Oklahoma Tax Commission*, 334 U.S. 717, on the ground that it violated its duty as a fiduciary in not seeking the overruling of the *West* decision.
2. Whether *West v. Oklahoma Tax Commission*, 334 U.S. 717, should be overruled.

STATEMENT

In 1948, this Court held, in *West v. Oklahoma Tax Commission*, 334 U.S. 717, that the State of Oklahoma may levy its inheritance tax on the estates of restricted Osage Indians, including the portions of such estates held in trust by the United States. The trust properties in *West*, as in the present case, consisted of mineral headrights in Osage lands in Oklahoma, a proportionate share of the sum realized from selling previous tribal lands in Kansas, and additional items representing accumulated income; indeed, the cases both involved shares of the same fund.¹

In 1967 and 1968, the Osage Agency of the Bureau of Indian Affairs, Department of the Interior, paid to the Oklahoma Tax Commission the total sum of

¹ Compare Pet. App. A-4 in No. 72-606 with 334 U.S. at 719.

\$8,087.10 in inheritance taxes on the estate of Rose Mason, an incompetent or restricted Osage Indian. Her administrators then brought the present suit against the United States in the Court of Claims, alleging that this Court's decision in *West* had been so weakened by subsequent cases that the United States as fiduciary was obliged to challenge the tax, and not to pay it.

The Court of Claims held that because of this Court's decision in *Squire v. Capoeman*, 351 U.S. 1, and subsequent developments "the *West* result is no longer controlling * * *" (No. 72-606, Pet. App. A-24), that the United States' payment of the tax was therefore a breach of its fiduciary duty to the Mason estate, that the measure of damages is the amount of tax paid, that the United States is liable in that amount to the estate, and that the United States is entitled to be indemnified by the State of Oklahoma in the same amount.

The State of Oklahoma, which bears the ultimate burden of the decision below, has filed a petition for certiorari (*State of Oklahoma v. Mason and the United States*, No. 72-606) to review the holding below that Oklahoma is bound to repay the tax. Though the question in that case is not identical with the issue raised here, it is obvious that the two cases are closely related.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims creates serious doubt, which only this Court can settle, con-

cerning the duty of the government with respect to the payment of state inheritance taxes on the restricted estates of Indians. This Court in *West, supra*, recognized that the Osage property in question in that case (and here) which the United States held in trust was not itself taxable (334 U.S. at 725) but distinguished between a tax on the property and a tax on the transfer of the property to another (*id.* at 727). The Court was aware that the economic effect of either tax could be the depletion of the trust corpus (*id.* at 725). The decision was consistent with then permitted federal income taxation of the revenues produced by such property and the imposition of federal estate taxes on the transfer of such property.

Several years later in *Squire v. Capoeman*, 351 U.S. 1, this Court held that the government's statutory duty to return lands to Indian allottees free of any lien or encumbrance prohibited the United States from assessing a capital gain tax on the profit resulting from a sale of timber produced on the allotted trust land. The Court stated that "to protect the Indians' interest * * * it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens." 351 U.S. at 9.

As a consequence of *Squire v. Capoeman*, the federal government no longer attempts to tax income derived by Indians directly from the use of Indian land which is itself tax exempt unless Congress has specifically authorized such taxation. See our *amicus* brief in

Mescalero Apache Tribe v. Jones, No. 71-738, certiorari granted, April 24, 1972 (406 U.S. 905).

The Internal Revenue Service has also ruled that property such as that in question here is immune from the federal estate tax. See Rev. Rul. 69-164, 1969-1 Cum. Bull. 220. The Court of Claims has now in effect ruled that *West* is no longer good law as applied to a state inheritance tax. Although a determination of the continuing validity of *West* may not be essential for a determination of this case (including the State's petition in No. 72-606), the question is properly before the Court, the issues have been fully developed in the proceedings below, and, in our view, it would be appropriate for the Court to settle the matter now.

2. Whether *West* is reaffirmed or overruled, the decision of the Court of Claims holding the government liable for breach of fiduciary duty should be reversed. We agree that the government has a fiduciary duty to preserve the estate of Rose Mason and not to pay a tax that is not owed. But the government as trustee also has the duty to pay taxes that are due. *West v. Oklahoma Tax Commission* is not an authority only obliquely in point; it is a decision of this Court squarely ruling on the same tax as applied to the same fund in question here. No subsequent opinion of this Court has questioned the continuing validity of *West*. Though the Court may now overrule *West* and though a trustee might have been justified in refusing to pay the tax in order to test the continuing

vitality of *West*, we know of no precedent (prior to the decision below) for imposing so strict a standard on a trustee, governmental or private, as to hold him liable in damages if he fails in such circumstances to contest a direct holding of the highest court of the relevant jurisdiction. The decision of the Court of Claims not only imposes that standard but assumes a 100 percent probability that this Court would overrule *West* to justify a measure of damages at the full amount of tax paid. This unprecedented imposition of liability on a trustee for complying with one of this Court's previous decisions should not be permitted to stand.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

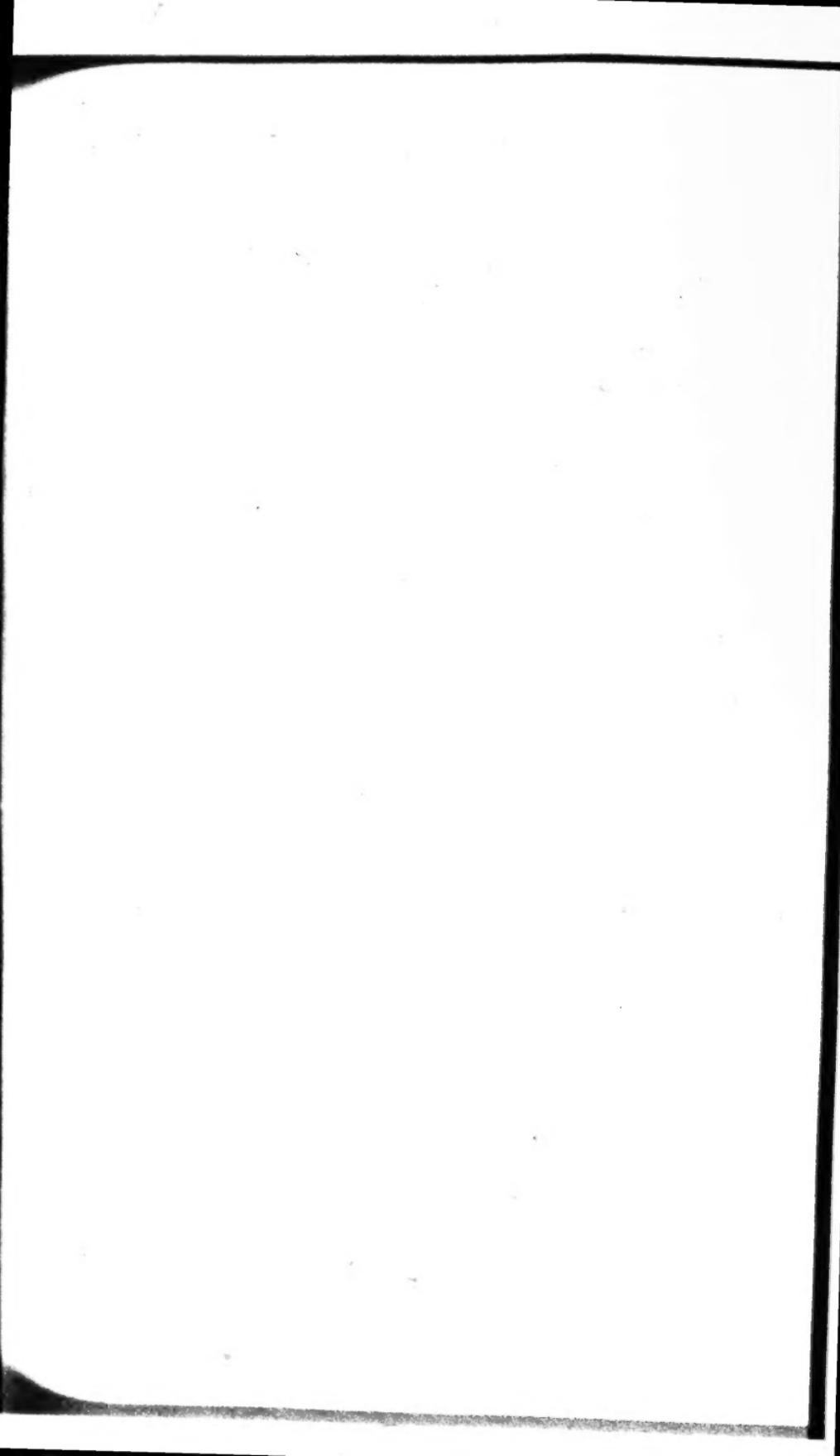
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THE BIRDS OF THE
MOUNTAINS

STATE OF OKLAHOMA.

Patent No. 2,313,250

ANDREW L. MASON, ESQ.

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UNITED STATES OF AMERICA

THE BIRDS

AMERICAN MAGAZINE

PRACTICAL

BLIND IN OPPOSITION TO PROVISIONS FOR WRITE OFF CERTIFICATES

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OCTOBER TERM, 1972

No. 72-606

STATE OF OKLAHOMA,

Petitioner,

v.

ARCHIE L. MASON, ET AL.,

Respondents.

No. 72-654

UNITED STATES OF AMERICA,

Petitioner,

v.

ARCHIE L. MASON, ET AL.,

Respondents.

**BRIEF IN OPPOSITION TO
PETITIONS FOR WRIT OF CERTIORARI**

Respondents Archie L. Mason and Margaret R. Mason, administrators of the estate of Rose Mason, herewith file their opposition to the petitions for writ of certiorari filed by the State of Oklahoma and the United States to review the judgment of the United States Court of Claims in this case.

STATEMENT

This litigation concerns the applicability of the Oklahoma estate tax to properties held in trust by the United States under the Osage Allotment Act of 1906, as amend-

ed. Under the terms of that Act, the United States serves as trustee over certain properties of Osage Indians who have not received a certificate of competency. Respondents' ancestor, Rose Mason, was a restricted, non-competent Osage Indian for whom the United States served as trustee pursuant to the Act.

On the death of Rose Mason, the United States filed an Oklahoma estate tax return on behalf of her estate and included therein, as part of the taxable corpus of that estate, property held in trust by the United States pursuant to the Osage Allotment Act. In accordance with the return, the United States made payments of Oklahoma estate taxes in September, 1967 and December, 1968. The United States never challenged or contested the assessment of Oklahoma estate taxes on these trust properties but simply paid these taxes out of trust monies without hesitation; nor did the United States ever seek a refund of the taxes paid. In November, 1970, respondents, as administrators of the estate of Rose Mason, filed suit against the United States, charging a breach of fiduciary duty, and challenging the legality of the payment of Oklahoma estate taxes assessed against properties held in trust by the United States. The State of Oklahoma was thereupon impleaded by the United States as a third-party defendant.

The United States and Oklahoma defended on the principal ground that payment of Oklahoma estate taxes was an appropriate expenditure under the authority of *West v. Oklahoma Tax Comm'n*, 334 U.S. 717 (1948).

Subsequent to briefing and argument, the Court of Claims held (a) that *West v. Oklahoma Tax Comm'n* had, by implication, been severely modified, if not overruled, by *Squire v. Capoeman*, 351 U.S. 1 (1956), and that the *West* case had not been followed by the lower federal courts since the *Capoeman* case, and that there-

fore the payment of state death taxes was unlawful; (b) that the United States had breached its fiduciary obligation by not contesting the imposition of Oklahoma estate taxes on the trust properties of respondents' ancestor or seeking a refund thereof despite clear notice that the law had changed; and (c) that the United States was therefore liable for the amount of estate taxes wrongfully paid over, and that, in turn, the State of Oklahoma was liable to the United States for the amount of estate taxes unlawfully collected.

The Court of Claims noted that the United States itself had conceded that Osage trust property was exempt from federal death taxes, which are not distinguishable in principle from state death taxes.¹ Even after this concession was made, the United States continued to pay Oklahoma death taxes with respect to Osage trust properties. The court concluded that the failure of the United States to challenge payment of the state taxes assessed against the Mason estate or to seek a refund required a conclusion that the United States had breached its fiduciary obligation.

¹ In *Beartrack v. United States*, Ct.Cl. Dkt. No. 281-67, the representative of a deceased restricted Osage sued for a refund of federal estate taxes which the United States had imposed on the estate. The suit was based on the contention that the *Capoeman* rationale applied to Osage trust properties. Before the case was decided, the United States in effect confessed error, and voluntarily refunded the entire amount of federal estate taxes. Subsequently, the Internal Revenue Service issued a ruling that the *Capoeman* rationale immunized Indian trust properties from federal estate taxation (Rev.Rul. 69-164, 1969-1 I.R.B. 220) and, in another ruling, specifically held that Osage trust properties were immune from such taxation. These events all occurred before, or shortly after, the payment of Oklahoma estate taxes in the instant case.

ARGUMENT

Respondents submit that review is not required because the *West* case was effectively overruled by *Squire v. Capoeman*. However, if certiorari is granted it should be limited to whether *West v. Oklahoma Tax Comm'n* any longer represents good law. The other questions presented by the petitioners are either premature, and should not be considered by the Court at this time, or they do not warrant review.

I

Certiorari Should Be Limited to Whether *West v. Oklahoma Tax Comm'n* Should Be Overruled.

There is no question that the decision of the Court of Claims in this case is contrary, at least on its face, to the result reached in *West v. Oklahoma Tax Comm'n*.² As the opinion of the Court of Claims makes clear, however, the *West* case was not this Court's last pronouncement on the issue of Indian taxation. In 1956, this Court issued the landmark decision of *Squire v. Capoeman, supra*, which, while not explicitly overruling *West*, clearly and necessarily modified the decisional rationale of that earlier case. *Squire v. Capoeman* modified the *West* decision in these major respects:

(1) *Capoeman* revitalized the traditional liberal policy of statutory interpretation governing the taxability of Indians and Indian properties, a policy not found in *West*; (2) *Capoeman* laid down the principle that while Indian tax immunity had to be found in treaties or

² The Court of Claims recognized that it is possible to read *West* as exempting these trust properties from state death taxation on the basis of another point decided in *West*, namely, that properties exempt from "direct" taxation are also exempt from death taxation, since it is now recognized that income from Osage trust property is exempt from federal income taxation, a form of direct taxation. 461 F.2d at 1378.

statutes, as *West* and other cases had held, the immunity need not be express, and can be based on clear implication; (3) *Capoeman* emphasized the statutory undertaking of the United States to preserve and protect Indian trust properties during the period of the trust, thus effectuating the policy and purpose of Indian allotment statutes, and concluded that this undertaking clearly implied tax immunity. Since *West* had found (but without the kind of analysis made in *Capoeman*) that the Osage Allotment Act did not confer immunity, and yet *Capoeman* had found immunity in an indistinguishable allotment act, it was obvious that the later case was inconsistent with the earlier one, and represented a change in the law.

Since the *Capoeman* decision, no less than four lower federal courts, in six separate decisions, have considered the impact of *Capoeman* on the issue of federal and state death taxation of Indian trust properties and each of these courts has consistently construed *Capoeman* as requiring a finding of the tax immunity for such properties.³ Additionally, the United States has determined that *Capoeman* prohibits federal income taxation of income derived from Indian (including the Osages) trust properties and the imposition of federal estate taxes thereon. See Petition of the United States, pp. 4-5.

West v. Oklahoma Tax Comm'n has never been directly and expressly overruled. The time may be appropriate for a reexamination of the tax immunity of properties held in trust by the United States pursuant to the Osage Allotment Act and, more particularly, to consider whether the *West* decision, if truly contrary to the result reached in the instant case, still has vitality. The question of that case's continuing validity is properly before the Court and was directly and essentially litigated below.

³ These cases were all considered by the Court of Claims. See 461 F.2d at 1370-71.

II

**The Other Questions Presented by the Petitioners
Are Not Appropriate for Review.**

The several other questions presented by the petitioners for this Court's consideration on certiorari do not merit review. These questions are either not raised by the facts in the instant case or they involve questions of law which are neither novel nor significant. The reasons for denying certiorari of these questions are dealt with below.

A. Adherence to Earlier Supreme Court Precedent.

No appropriate ground for certiorari review is presented by the State of Oklahoma's argument concerning the Court of Claims' holding that *West v. Oklahoma Tax Comm'n* no longer represented good law. The only legitimate issue arising from the Court of Claims' decision not to follow *West* is whether its perception that *Squire v. Capoeman, supra* and its progeny constituted a new decisional trend was a correct one. This question goes, of course, to the matter of the continuing validity of *West*, a matter which respondents concur may merit the consideration of this Court.

There is no substance to the argument that the Court of Claims lacked power to deviate from *West*. The opinion of the Court of Claims demonstrates that that court was fully cognizant of the limitations on its power, and the care and sensitivity with which a lower court must approach the question of not following a Supreme Court case in point. The considered analysis made by the Court of Claims of the *West* and *Capoeman* decisions and the interpretation and application of the *Capoeman* rationale by the lower federal courts and the Internal Revenue Service show definitively that the Court of Claims approached this sensitive area with the degree of care and deference required of an inferior court.

If it is the position of the State of Oklahoma that a lower federal court must *always* follow an earlier Supreme Court precedent, regardless of changed circumstances or intervening events, it is clearly wrong. The relevant authorities demonstrate that in infrequent, well-defined circumstances, it is both appropriate and requisite for a lower federal court to conclude that an earlier Supreme Court case no longer represents good law. See, *e.g.*, *Rowe v. Peyton*, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968); *Andrews v. Louisville & N.R.R.*, 441 F.2d 1222 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972); *Browder v. Gail*, 142 F.Supp. 707 (M.D.Ala. 1956), *aff'd*, 352 U.S. 903 (1956); *Barnette v. West Virginia State Board of Education*, 47 F.Supp. 251, 252-53 (S.D.W.Va. 1942), 319 U.S. 624 (1943); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

B. Liability of State of Oklahoma.

The State of Oklahoma raises no meritorious question in arguing that it should not be held liable for a breach of fiduciary relationship by the United States. This argument exhibits a basic misconception of the decision below and of the nature and purpose of third-party practice and procedure. The basic object of third-party procedure is to avoid circuity of action and to insure consistency of result where the respective liabilities of several parties arise from the same set of operative facts. In third-party practice, it is not necessary that there be an identity between the legal theory or basis of the claim asserted against the defendant and the claim asserted against the third-party defendant. It is only required that their respective alleged liabilities arise from the same set of operative facts.

In the instant case, the State of Oklahoma was not held liable for breach of fiduciary duty. Instead, it was held liable over to the United States on the ground that

the estate taxes collected by it against the estate of Rose Mason were wrongfully exacted and were not in fact due. There is ample authority for the proposition that the United States, as trustee, can sue for return of money improperly paid over. See *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968). The theory of liability in such an instance is not for breach of a fiduciary obligation but for return of money improperly paid and received. There is thus clearly no point in requiring the parties to brief and argue, and the Court to consider, such a question. The only real question is whether *West* is still good law. If not, Oklahoma must disgorge what it wrongfully collected.

C. Retroactive Operation of Decision.

The last question presented by the State of Oklahoma is whether it may be held liable retroactively should the *Mason* decision be upheld. Consideration of the retroactivity issue would be premature at this point. This issue was not considered in the proceedings below and was not raised by the facts in the instant case. This suit involved only a challenge of the legality of the payment of Oklahoma estate taxes with respect to the estate of Rose Mason and no other payments. In view of this limited claim, there was no development of the considerations and circumstances relating to the issue of retroactivity.⁴

This Court has observed that a determination on the issue of retroactivity must be premised on a full consideration of the facts and circumstances relating to the individual case. See *Linkletter v. Walker*, 381 U.S. 618, 627-29 (1965); cf., *Simpson v. Union Oil Co.*, 377 U.S.

⁴ The question of retroactivity may well be in issue in two related suits which are presently pending in the lower federal courts, one in the United States District Court for the Western District of Oklahoma and the other in the Court of Claims. See Petition of State of Oklahoma, pp. 6-7.

13, 24-25 (1964). Respondents respectfully submit that there was no ventilation or exploration below of the factors relevant to a determination of retroactivity, so that this Court's consideration of that issue at this time is not warranted. Respondents would note, at this point, however, that the policy and purpose of the Osage Allotment Act—preservation and protection of the trust properties of Osage Indians until termination of the trust—commend application of the general rule of retroactivity to the decision below.

D. *Fiduciary Duty of the United States.*

The United States argues that the decision of the Court of Claims imposed an unwarranted fiduciary duty on it. In fact, the decision of the Court of Claims represents nothing more than the application of well-established trust principles. The decision did not announce any novel concept of trust law nor did it impose any unreasonable responsibility on the United States.

The Court of Claims decided that the United States had violated its duty to its Indian ward by neither contesting the applicability of Oklahoma estate taxes to the trust properties in question, nor seeking a refund of those taxes after they had been paid. The Court of Claims concluded, *on the basis of the facts of this case*, that this Court's decision in *Squire v. Capoeman*, the application of the *Capoeman* rationale to similar classes of Indian trust properties by lower federal courts and certain administrative action of the United States itself, raised such a serious question as to the validity of *West* as a precedent as to require affirmative action on the part of the United States to get it resolved one way or the other.⁵

⁵ The Court of Claims did not decide the issue of whether the United States would be required to reimburse the estate of Rose Mason for unlawfully collected taxes regardless of considerations of notice of the "possible fallibility of *West*." 461 F.2d at 1372.

The opinion of the Court of Claims ably sets forth the intervening judicial decisions since *West* and no purpose would be served by repeating this history here. See 461 F.2d at 1370-71, 1376-77. The Court of Claims also considered the fact that, no later than a few months after its final payment of taxes with respect to the *Mason* estate, the United States had completely adopted the *Capoeman* rationale with respect to federal estate taxation of Osage estates. The inherent contradiction between this action and the failure of the United States to even seek a refund of the taxes paid on behalf of the *Mason* estate is inescapable.*

As far as the *factual* part of the lower court's holding is concerned, there was ample support in this record for the conclusion that the failure of the United States to take *any* action with respect to the Oklahoma estate taxes assessed against the estate of Rose *Mason* was unreasonable under the circumstances and a breach of its fiduciary duty. That being the case, no ground for review by this Court is raised with respect to the Court of Claims' decision concerning the "unreasonableness" of the actions of the United States.

So far as the *law* is concerned, the Court of Claims only followed established principles governing the fiduciary duty of the United States to its Indian wards, and nothing worthy of review is presented. There can be no doubt that the United States owes its Indian wards a fiduciary obligation of the highest order. See, *e.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 297-98 (1942). It is also clear that the United States has the obligation and the power to protect its Indian wards and to preserve their rights and immunities. See, *e.g.*, *Board of County Comm'r's v. Seber*, 318 U.S. 705, 715-17

* In fact, the United States continued to pay Oklahoma estate taxes assessed with respect to trust properties of restricted Osage Indians until after the decision of the Court of Claims in this case.

(1943); *Mott v. United States*, 283 U.S. 747, 750 (1931). This obligation has been specifically recognized with respect to the Osages and to suits by the United States to recover state taxes unlawfully imposed on Osage property. See *United States v. Board of County Comm'rs of Osage County*, 251 U.S. 128 (1913), *cf.*, *Mashunka-shey v. United States*, 131 F.2d 288, 291 (10th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943).

A necessary concomitant to this duty of protection is the responsibility and requirement to act when the relevant circumstances require it. This requirement or responsibility is no more extensive than the established equitable principle that a trustee has the affirmative duty "to do what is reasonable under the circumstances" to resist and defend against claims of third persons against the trust. See II Scott, *Trusts* § 178 (3d ed. 1967); see *id.* at § 177.⁷ The decision of the Court of Claims rests firmly on established equitable principles governing the duties and obligations of a trustee and no new or signal point of law is raised with respect to this question by that decision. Accordingly, the petition of the United States requesting review of this particular question should be denied.

⁷ The affirmative duty of the United States to seek recovery of taxes on behalf of its Indian wards was recognized in *United States v. Dewey County*, 14 F.2d 784 (D.S.D. 1926), *aff'd*, 26 F.2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928); *United States v. Nez Perce County*, 16 F. Supp. 267, 268 (D.Idaho 1936), *aff'd*, 95 F.2d 232 (9th Cir. 1938); *cf.*, *Town of Okemah v. United States*, 140 F.2d 963, 974 (10th Cir. 1944); *United States v. Charles*, 23 F.Supp. 346, 348 (W.D.N.Y. 1936).

CONCLUSION

For the foregoing reasons, respondents suggest that if certiorari should be granted, it be limited to the sole issue of whether *West v. Oklahoma Tax Comm'n* is still good law.

Respectfully submitted,

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